In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1092

JACK MARBIN WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. 23) is reported at 340 F. 2d 612. A prior opinion is reported at 311 F. 2d 441.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1965. A petition for rehearing was denied on March 22, 1965. The petition for a writ of certiorari was filed on April 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

775-282—65

QUESTION PRESENTED

Whether the court of appeals properly interpreted its earlier opinion reversing a prior conviction as it relates to the defense of entrapment.

STATEMENT

Petitioner and two others were charged in an indictment returned in the Northern District of Mississippi with possession of 179 gallons of whiskey in unstamped containers, in violation of 26 U.S.C. 5604(a)(1). At the first trial, the government, with the consent of the defendant, took the deposition of an informant, Mr. Moye, and introduced it as part of the prosecution's case (1 R. 96-101).[1] Mr. Moye testified that, on September 12, 1960, following his release from the penitentiary, he communicated with a government agent because he wanted to make some money and because no bootlegger had assisted him during his confinement. Two agents agreed to pay him $10 a day and additional sums of $200 and $160 respectively if they caught petitioner and his half-brother. A week or two later Moye, using a close friend of petitioner's to vouch for him, arranged to buy some moonshine whiskey from petitioner. 311 F. 2d at 442-444. On October 15, 1960 at 1:30 a.m., petitioner sold Moye 179 gallons of moonshine whiskey for $716. An undercover agent, Robert E. Lee, witnessed the transaction and drove with petitioner and Moye to the place where the transfer took place (1

[1] The designation of "1 R." refers to the record of the first trial, "2 R." to the present record.

R. 104–107). The government rested its case on the deposition of Moye and the testimony of agent Lee. The defense presented no testimony. At the conclusion of the case, the court submitted the question of entrapment to the jury (1 R. 128), which returned a verdict of guilty.

On appeal, the court of appeals (one judge dissenting) ruled that the uncontradicted and unexplained testimony as to the terms of Moye's employment required reversal. The leading opinion stated that it was possible that the contingent fee was justified, *i.e.*, it was possible that the investigators had instructed Moye concerning the rules against entrapment and it may have been clearly understood that he was not to induce a crime, but that none of the facts and circumstances were developed by the evidence. 311 F. 2d 441.

2. The second trial was heard by the court without a jury. Before the trial commenced, the court inquired if it should consider the transcript of the testimony on the former trial and then develop the record further on the issue whether the informer "was, in effect, corrupted and thus corrupted the defendants in the contingent fee arrangement apparently made for his services?" (2 R. 12). The government responded that Moye's testimony should be treated as part of the defendant's case since entrapment was a defense. Petitioner would not agree to this condition and suggested "that the government just go on and put on its case as it sees fit and we'll see where we get to." (2 R. 12–13). The govern-

ment then called agent Lee as a witness. When Lee was asked if he had conversed with Moye and petitioner on October 15, 1960, petitioner objected. He contended that Lee's testimony was not admissible under the ruling of the court of appeals until it was shown that the agents had knowledge that petitioner was engaged in illicit liquor dealings and that the agents had instructed Moye on the rules of entrapment (2 R. 15–16). The government indicated that it did not oppose this requirement. It pointed out, however, that the defendant had a right not to raise the defense of entrapment. Noting there was no evidence at this trial of any contingent fee arrangement, it suggested that petitioner introduce the deposition of Moye to support his contention (2 R. 16–18). The court reserved its ruling on the objection (2 R. 18). Lee then described petitioner's sale of the moonshine whiskey to Moye (2 R. 18, 22).

The government, before resting, stated that if the court considered that it had the deposition of Moye before it, it would proceed further in accordance with the ruling of the court of appeals. When the court replied that it did not, the government rested. Petitioner, asserting that the court should take judicial notice of the deposition on file in the case, moved to strike Lee's testimony and contended that the ruling of the court of appeals made his testimony incompetent. The court rejected this contention on the ground that the former record would not have been available to a jury and that it was hearing the case as a jury (2 R. 24–25). Petitioner then rested.

The government then stated that, if the defense had raised the issue of a contingent fee, it had witnesses present to testify "on that point to overcome what we think the Circuit Court of Appeals has raised" (2 R. 26-27). The court thereupon found petitioner guilty (2 R. 29-30). The court of appeals affirmed the conviction.

ARGUMENT

Petitioner raises the question whether the district court and the panel of the court of appeals which affirmed the present conviction properly interpreted the prior opinion of the court of appeals, reported at 311 F. 2d 441, as it bears on the defense of entrapment. If it did, then, as both courts below have held, the issue as to the informer is clearly not now present in this case for petitioner, although given every opportunity to do so, failed to raise any issue as to entrapment or the use of the informer which would make it incumbent upon the government to produce the evidence of justification which it stated it had available and was ready to produce. The district court also indicated that it was ready to pass upon the question as it would if the issue had been raised in a case in which a jury had not been waived, *i.e.*, where the defendant put in some evidence to raise it. Petitioner deliberately chose not to raise the issue.

We believe that the district court and the court of appeals correctly interpreted the prior opinion of the court of appeals. A majority of the original panel—Judge Rives, the author of the leading opinion, and

Judge Cameron—unquestionably treated the matter as one of entrapment. Judge Brown, the third member of the original panel, manifestly deemed the leading opinion as based on entrapment since his special concurrence explained why he viewed the matter otherwise. It is significant that Judge Brown was on the panel which affirmed the present conviction on retrial and joined in the *per curiam* opinion holding that, on the record in this case, there was no reason for the trial judge to determine any issue relating to the informer. There is thus no occasion for this Court to review the Fifth Circuit's interpretation of its prior opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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